Supreme Court, U.S.
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No. 05-1660

IN THE

# Supreme Court of the United States

COUNTY VANLINES, INC., PETITIONER

*v.*

EXPERIAN INFORMATION SOLUTIONS, INC.,
ALSO KNOWN AS EXPERIAN

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## REPLY BRIEF

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## PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

**1. The Respondent uses the ABC Needlecraft v Dun and Bradstreet case to support its position when in fact it only indicates that the Petitioner was truly denied its right to a jury.**

The respondent on page 3 states "The court [Second Circuit] began by noting that "it is undisputed that credit reporters enjoy qualified immunity from defamation actions and that therefore County Vanlines would need to show common-law or constitutional malice to prevail." Pet. App. 3a (citing *A.B.C. Needlecraaft Co., V Dun & Bradstreet Inc.* 245 F2.d 775, 777 (2d Cir. 1957". First this case was decided prior to *Gertz.* But more of an indictment is the purported decision of the court in *Needlecraft.* Judge Stewart delivering the opinion stated, "But we cannot agree that the evidence was insufficient to entitle a jury to find that the privilege was destroyed under the circumstances disclosed. While there was not proof that the appellant was activated by ill will or knew that the statement was false when made, the 'malice' required to destroy the privilege does not alone mean actual malice, as the appellant recognizes and as this court in two recent decisions has had occasion to point out. *De Ronda v. Gaytime Shops*, 2 Cir.. 1957 239 F.2d 735, 738;*Stephens v. Columbia Pictures Corporation*, 2 Cir., 1957, 540 F.2d 764, 767. Under the law of New York the malice necessary to destroy a qualified privilege can also consist of 'such a wanton and reckless disregard of the rights of another as is ill will's equivalent.' *Pescue v West*, 1922, 233 N.Y. 316,322, 135 N.E. 515,517. The court continued and said. "Whether the proof showed

such constructive malice was a question of fact to be submitted to the jury." The *Needlecraft* case involved words spoken between two individuals that were then transcribed erroneously into the credit report. It is also important to note, that New York law does not give a qualified immunity to "credit reporters"(response page 3) but gives a credit report a conditional qualified privilege as a result of the common interest doctrine.

**2. The Statement portion of the Response continues to show the continued attempt to mislead the reader as to the significance of major facts.**

The Statement made by the Respondent on page two of its response, is a continued effort to confuse the issue, the reference is made to "shared same address and telephone number" by CVL and the defunct CV&S of Delaware. Notwithstanding that at the time of the publication of the false and defamatory credit report of April 16, 2001 it was almost five years since the death of County Van and Storage Co., of Delaware. This is only one fact, the maintenance of the files of the defunct business that did not have one single transaction since August, 1996 and the same file number for the defunct business appearing in all three of the defamatory reports and the inconsistent false data contained in the three reports was more than sufficient evidence to allow the jury to make its determination of "Whether the proof showed such constructive malice" as stated by the Court in the *Needlecraft* case". But by using the literal interpretation of ill will and state of mind, both lower courts permitted these subjective standards to produce an illogical and impossible situation for Petitioner to overcome. Even this response of

Respondent fails to attempt to point out any review, investigation, or research of the false defamatory material prior to publication performed by Respondent.

3. **The Respondent failed to state any substantive reasons for denying this Petition.This Court should define the meaning of the *Gertz* case followed by the Highest Court of A State, New York, setting forth a standard in compliance with this Court's directive making the *Chapadeau* Standard the law of New York.**

The Respondent stated its reasons for denying the petition on page 4 and 5 of its response. It is unfortunate that the Respondent relegated the *Chapadeau* case to only a footnote in its response (page 5). Considering that that case is the decision of New York's highest court, set the basis for a standard directed by this Court in *Gertz*, and has to its credit more than 450 citations from cases and leading legal authorities. In contrast is the respondent's reliance upon *Liberman and Gelstein* (page 4) which has only been cited three times, is a libel case dealing with words spoken between two individuals, and the case primarily dealt with deciding if a privilege existed, if the crime involved was serious enough to qualify for per se designation and does not agree with the *Konifoff* case (*Konikoff v Prudential Insurance Co of America 234 F. 3rd 92 (2nd Cir 2000)* . The *Konikoff* case said, **"In *Gertz*, decided some ten years after *Sullivan*, the Supreme Court turned to the question of what standard the First Amendment required private defamation plaintiffs to meet in defamation cases. The Court held, *inter alia*, "that, so long as they do not impose liability without**

**fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." the court continued and said, "The vast majority of states subsequently decided that the "appropriate standard of liability" left for them to decide by *Gertz* is negligence". Finally the *Konikoff* court then stated what the highest court of NY set as the new standard for New York as directed by *Gertz*, "the party defamed may recover" if he or she can establish "by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties".** *Chapadeau* did not pick a lesser standard, it chose what was a celebration of the *Gertz* decision recognizing that the states had a stake in this issue and directed the states to satisfy their interest in the matter of an individual's right to be protected against the abuse of the written word and in respect of the right of such publication. *Konikoff* clearly points out that New York applies the *Chapadeau Standard* to non media defendants and whenever there is a privileged person, communication, or media involved. It is inconceivable that the Respondent believes that the media or privileged public individual is entitled to less protection than a privilege resulting from a common interest, and no New York case allows absolute ill will, or malice. Further, New York cases require clean hands relating to a disseminated defamatory report and such a report that is published with no research, investigation, or review, cannot be considered to have been disseminated with clean hands.

In summary it is clear. That previously a jurist had to decide whether the common law standard or the constitutional standard applied in overcoming a qualified privilege with all of the numerous sub-standards that were in consideration. The *Gertz* and *Chapadeau* cases changed that. In New York whenever there is a privileged communication, individual or media involved, the *Chapadeau* standard shall apply. No court or jurist shall overcome the federal law of the land as set by this court in *Gertz*, or the law set by the Highest Court of Any State in compliance with this court's directive, by taking upon themselves a search for any other standard due to any personal desires or mental vanity.

## CONCLUSION

For the reasons stated in the Petition and herein, Petitioner respectfully requests that this Court grant a Writ of Certiorari and other relief requested in the Petition.

Respectfully submitted,
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